No. 10-494

In the Supreme Court of the United States

LAWRENCE LITTEN, ET AL.,
Petitioners,

v.

GRENADA COUNTY, MISSISSIPPI, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

1. Does the ripeness requirement of *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), that a person must first exhaust his state court remedies before bringing a fifth amendment takings claim in federal court, apply to physical takings?

LIST OF PARTIES

The following is a list of all parties to the proceeding in the Court below:

Plaintiff-Petitioners:

1. Lawrence Litten
2. Fletcher Fly

Defendants-Respondents:

1. Michael Lott
2. Grenada County, Mississippi
3. Yalobusha County, Mississippi

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STATEMENT REGARDING JURISDICTION

This Court lacks subject matter jurisdiction of this matter, as Fletcher Fly has not perfected his claims by exhausting his available state remedies for just compensation, and therefore this case is not ripe for adjudication in the federal courts.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Petitioner filed suit against Yalobusha County, Mississippi in the United States Court for the Northern District of Mississippi pursuant to 42 U.S.C.A. § 1983, alleging that Yalobusha County, Mississippi, violated his rights secured by the 5th and 14th Amendments of the Unites States Constitution.

STATEMENT OF THE CASE

Petitioner alleges that in the year 2000 he suffered an uncompensated taking of his land, due in part to the passage of Miss. Code Ann. §§ 65-7-4, et seq. The passage of this law was to map and register the county roads of Mississippi. The legislative intent of this statute is laid out in the following section which states in part that:

> the proceedings and public hearing required for initial adoption of the official map and county road system register ...are **not intended to lay out, open, designate or otherwise establish new public roads**, but to document and record existing roads which are, at the time of the initial adoption of said map and register, adjudicated by the board, consistent with fact,

> to be public roads by dedication, under the methods provided by statute, or by prescription and required by public convenience and necessity.

Miss. Code. Ann. § 65-7-4.1 (West), (*emphasis added*).

Petitioner alleges in his Petition that "the statute required that if a right of way were to be added to the prescriptive easement over a historically publicly used road, the County must pay for it." citing Miss Code Ann § 65-7-7. This statement is false, as Miss. Code Ann. §65-7-7 relates to the clearing of obstructions along county roads, and §65-7-71, relates to the payment for rights-of-way to a drainage district.

Statement of the facts:

Fletcher Fly inherited land from his father in 2001. This land contains approximately 162.4 acres and is traversed by a public road. This road has been recognized by Yalobusha County as Yalobusha County Road 161 since 2000, and prior thereto, dating back to 1942, as the Henry Hudson Road. (RE 135-138). Appellant has stated that the road has been there as long as he can remember. (RE 182). The Yalobusha County Tax Assessor only assesses Fletcher Fly for 160.2 acres. 2.2 acres is taken out of Appellant's total acreage because it is contained within County Road 161. (RE 135-138).

Appellant admitted that from 1985 to 2003 County Road 161 was maintained by Yalobusha County from its beginning to its Northern portion. (RE 171). Specifically in 1996, County Road 161 was listed on the county road system, maintained by the county, and

found to be in satisfactory condition as evidenced by entry on the minutes of the Board of Supervisors. (RE 172-181). However, there was a segment of County Road 161, approximately 350 feet in length, that received no county maintenance for approximately three years. (RE 140-143).

In 2000, pursuant to Miss. Code Ann., § 65-7-4, the Yalobusha County Board of Supervisors established a county road register and official map. On May 25, 2000, a notice that a public hearing would be held on June 12, 2000 seeking public comment on the official county map and road system registry was published in the North Mississippi Herald and Coffeeville Courier, newspapers of general circulation throughout Yalobusha County. A hearing was held on such date and time, but no interested members of the public attended. (RE 183-188). This is reflected in the June 16, 2000 Order of the Board of Supervisors, wherein the map and registry were adopted. *Id.*

Pursuant to the aforementioned order, Yalobusha County posted the road running through Appellant's property with a sign bearing the words "CR 161". (RE 153-156). Appellant stated that he first learned about the road being named County Road 161 somewhere about the year 2000 or 2001. (RE 189).

Appellant acknowledged that from 2003 to date, Yalobusha County has maintained the road. (RE 190). He also acknowledged that Yalobusha County has been claiming and referring to the road that ran through his property as County Road 161 since 2002. (RE 191).

Appellant filed suit before the United States District Court for the Northern District of Mississippi on January 22, 2008. Paragraph 2 of the Appellant's Complaint clearly states that County Road 161 "had, indeed once been a public road." (RE 195-204). Yalobusha County has never abandoned County Road 161 by minute entry. (RE 205). Furthermore, Appellant does not contend, nor has proof been presented, that he or his family ever gave permission to the public to use the road.

In 1979, the Tillatoba Water Association constructed a water line within the right-of-way of County Road 161. This water line begins at the intersection of County Road 161 and County Road 154 and extends in a northerly direction into Section 19. (RE 168-169). Other public utilities such as AT&T (1985) and Tallahatchie Electric Power Association use County Road 161 to provide service to the LaGassee family, the Magee Hunting Club and David LaGasse. (RE 168-170). Such utilities have served the area landowners for forty years. *Id.* During this service, the utility companies have had to go down County Road 161 for inspection and repairs of their transmission lines. *Id.* There are presently three (3) dwellings located on land near County Road 161. One is occupied by the LaGasse Family as a weekend retreat, one is owned by David LaGasse, which is also used for recreational purposes, and the remaining cabin is occupied by the Magee Hunting Club. All three owners use County Road 161 for ingress and egress to their properties. (RE 153-156).

Disputed Facts:

Appellant has mentioned in his dissertation of the facts, Mr. Tillman's complaint of a road washout along County Road 161. The testimony from Mr. Tillman's deposition shows that the portion of road washed out lies in section 19. In his deposition, Mr. Tillman stated that:

> the road washed out just after you passed the Magee Hunting Club **on the Walker land**...and he [Mr. Moorman] asked Mrs. Walker if it would be all right with her for me to go around on her property, you know, and come back in the main road down below where it was washed out, and she said it would be. (emphasis added, text in brackets added for clarity)

Mrs. Irene Walker's property is in Section 19, her property line lies along County Road 161 at its current northern most boundary, which is also the North line of Section 30, and/or the South line of Section 19. (RE 139). (RE 241). At one time County Road 161 extended North into Section 19, and into Mrs. Walker's land. (RE 140-143). All of Fletcher Fly's property and the sections of road involved in this suit are located in section 30. Therefore, Mr. Tillman's problems in the early 1980s to the north of Plaintiff's property in section 19 are unrelated to this suit, because during this time he states that he continued to use the remainder of County Road 161 to access his property. "So all of it --- all of the years I had of the place after that, I went around Mrs. Walker getting to my property." (RE 242). The only significance of Mr. Tillman's problems in section 19 is the evidence it

provides the Court of the public's continued uninterrupted use of County Road 161.

As for the Mississippi Attorney General's Opinion request written by Defendant's attorney, the Opinion restates the facts provided them as following: "County maintenance from Point A to Point B has been almost nonexistent within the last 20 years." (RE 243-244). The Opinion does not state that there was no maintenance as contended by Appellant.

Also, incidental to the issue before the Court today, is the fact that nowhere in the record at pages 97-98 does it state that the Walker's requested that the County "retake" their driveway nor does it state that the Board of Supervisors of Yalobusha County granted any such request.

The dispute of facts above are not material to the District Court's rulings, and reference is made hereto solely for the Court's convenience.

Statement of the Procedural History:

Fletcher Fly approached the Yalobusha County Board of Supervisors and asked that County Road 161 be abandoned, or in the alternative, he be paid for the alleged taking of the road by the County. (RE 10-12). The Yalobusha County Board of Supervisors informed him that his request was improperly submitted. Thereafter, the Appellant submitted an Amended Complaint to the Board. (RE 13-15).

Thereafter, Fletcher Fly filed a complaint with the United States District Court for the Northern District of Mississippi alleging that his 5th and 14th

amendment rights had been violated. (RE 6). After the conclusion of discovery, Yalobusha County filed a Motion for Summary Judgment and supporting memorandum and exhibits. (RE 105-205). The Court found that Fletcher Fly's claims were not ripe for federal jurisdiction, as he had not exhausted his available state court remedies. (RE 272-273). After the Order granting Summary Judgment was filed, Fletcher Fly moved to Reform the Judgment pursuant to Rule 59 of the Federal Rules of Civil Procedure Motion. He alleged therein that he had presented a claim for a private taking. (RE 274-277). The District Court, over Yalobusha County's objections, found that Fletcher Fly had made a claim for an alleged private taking that warranted a reform of judgment, but that said claim fell under three of Yalobusha County's prior Summary Judgment arguments. (RE 322-326). Upon review of the pleadings and facts presented through discovery, the District Court found that there was no genuine material issue as to the fact that County Road 161 is a public road, and that therefore Summary Judgment as to Appellant's private takings claim was appropriate. (RE 322-326).

This matter was subsequently appealed to the 5th Circuit Court of Appeals who affirmed the District Court's ruling that Fletcher Fly's claims for relief were not ripe for redress.

Fletcher Fly, admittedly, has never sought state court relief.

REASONS FOR DENYING WRIT

Fletcher Fly asserts that *Williamson County's* ripeness requirements apply only to regulatory

takings, and that there is a split among the circuits as to whether the ripeness requirements apply to physical takings, of which, the 5th Circuit Court of Appeals is a minority. This however is not the case. In the matter sub judice, the 5th Circuit held the following:

> the two cases in this consolidated appeal have no mutual parties or shared factual circumstances, yet both present the threshold issue of whether the ripeness requirement in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), applies to claims of physical takings. We recently held that it does.

368 F. App'x 487 (5th Cir. 2010) *See Severence v. Patterson*, 566 F.3d 490, 496-97 (5th Cir. 2009)(*citing Urban Developers LLC v. City of Jackson, Miss.*, 468 F.3d 281, 294-95 (5th Cir. 2006).

Before delving into the issue of whether the Circuits are split, it is important to note that this issue has already been addressed by this Court in *Preseault v. Interstate Commerce Commission et al.*, 494 U.S. 1 (1990). As stated in Appellee's brief to the 5th Circuit, the Supreme Court in *Williamson County* established that there are two prongs that a claimant must satisfy for a takings claim brought under 42 U.S.C. § 1983 to be ripe. The first prong is whether a final decision by the governmental body has been obtained addressing how the regulation will be applied to the landowner's property. The second prong is whether the suffering landowner exhausted his available post-deprivation remedies in an attempt to garner just compensation. The Supreme Court in *Preseault* applied the second

prong of the *Williamson County* ripeness doctrine to a physical taking.

The Supreme Court in *Preseault,* which was an appeal from the 2nd Circuit, began its analysis by qualifying that the 5th Amendment does not prohibit takings, it only secures compensation in the event that there is a taking. *Id.*, at 11 *citing First English Evangelical Lutheran Church of Glendale v. Cnty. of Los Angeles,* 482 U.S. 304, 314 (1987). "If the government has provided an adequate process for obtaining compensation, and if resort to that process 'yield[s] just compensation,' then the property owner 'has no claim against the Government for a taking.' " *Id. citing Williamson County, supra*, 473 U.S., at 194. The Supreme Court then stated that the vehicle for seeking compensation for unconstitutional actions committed by the Interstate Commerce Commission was the Tucker Act, and that the proper venue for such an action was before the Federal Claims Court. *Id.*, at 17. The Court concluded that until the petitioners failed to receive compensation using the remedies provided by the Tucker Act, their takings claim was not ripe. *Id.*, at 17.

In support of his argument that the Circuits are split on this matter, Fletcher Fly states that the 5th, 7th, and 11th Circuits comprise a minority that requires "state judicial exhaustion" in a physical takings case. He then goes on to list a case for each Circuit that supports his alleged split. There is a fundamental problem with this list, however, because *Williamson County* is only cited in two out of the ten cases which allegedly support the "*Williamson County* physical/regulatory distinction." Further, none of the listed cases delve into the physical taking ripeness

issue. The two cases which do cite *Williamson County*, one of which, at least, refers to ripeness, only discuss the case in dicta. The case Fletcher Fly cited for the Ninth Circuit explicitly sidestepped the issue by stating that "we do not resolve whether this claim is ripe under the standards articulated in *Williamson*, and instead assume without deciding that the taking claim is ripe in order to address the merits of the appeal." *McClung v. City of Sumner*, 548 F.3d 1219, at 1224 (9th Cir. 2009). The other case that cites *Williamson, Building Owners & Managers Ass'n v. FCC*, does so in the concurring opinion as support for the argument that the Tucker Act allows the federal government to be held liable for takings. 254 F.3d 89, at 101 (D.C. Cir. 2001).

In an effort to provide the Court with an accurate view of the Circuit's holdings on this matter, here is a list of cases that actually cite *Williamson County*, and which are discussing ripeness issues.

The First Circuit Court of Appeals in *Pascoag Reservoir & Dam, LLC v. Rhode Island*, held the following:

> Although *Williamson County* was a regulatory taking case, a modified version of its timeliness analysis applies to physical taking cases. *Daniel v. Cnty. of Santa Barbara*, 288 F.3d 375, 382 (9th Cir. 2002). The present case concerns a potential physical taking, based on the intrusion onto Pascoag's property or the acquisition of rights in that property. In a physical taking case, the final decision requirement is relieved or assumed because "[w]here there has been a physical invasion, the

> taking occurs at once, and nothing the [governmental actor] can do or say after that point will change that fact." *Hall v. City of Santa Barbara,* 833 F.2d 1270, 1281 n. 28 (9th Cir. 1987)...However, the state action requirement remains in physical taking cases: "[C]ompensation must first be sought from the state if adequate procedures are available." *Sinaloa Lake Owners Ass'n v. City of Simi Valley,* 882 F.2d 1398, 1402 (9th Cir. 1989), *overruled on other grounds by Armendariz v. Penman,* 75 F.3d 1311, 1326 (9th Cir. 1996) (en banc).

337 F.3d 87, at 91 (1st Cir. 2003).

The Second Circuit Court of Appeals in *Villager Pond, Inc. v. Town of Darien* held the following:

> Villager Pond attempts to avoid this result by contending that a plaintiff who alleges a physical taking, as opposed to a regulatory taking, is not required to seek compensation in a state proceeding before the claim will be considered ripe...We reject Villager Pond's contention...*Williamson* drew no distinction between physical and regulatory takings, and the rationale of that case, that "a property owner has not suffered a violation of the Just Compensation Clause until the owner has unsuccessfully attempted to obtain just compensation through the procedure provided by the State," 473 U.S. at 195, 105 S.Ct. at 3121, demonstrates that any such distinction would be unjustified. Thus, regardless of whether Villager Pond's claim alleges a physical

> or regulatory taking, the claim is not yet ripe for review."

56 F.3d 375, at 380 (2nd Cir. 1995).

The Third Circuit Court of Appeals in *Miles v. Township of Barnegat* stated the following:

> We agree with the District Court's conclusion that the Plaintiff's taking claims are not ripe for review under *Williamson County*, as they have not availed themselves of their remedies under New Jersey law...The Plaintiffs argue that their challenge to the "direct conduct" of the Ocean County and Barnegat Township defendants in taking their property without instituting an eminent domain proceeding, is the kind of "facial" taking claim that is not subject to *Williamson County*...Here, the plaintiff's inverse condemnation claim seeks just compensation, not the invalidation of an ordinance or statute on its face. Accordingly, we will affirm the judgment of the District Court.

334 F. App'x 841, at 845 (3rd Cir. 2009).

The Fourth Circuit Court of Appeals in *Plakas v. County of Middlesex, Virginia*, held the following:

> The Plakas claimed under 42 U.S.C. § 1983 a taking of their private property without just compensation and a denial of due process by the County's operation of the public pier...*Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 53 U.S.L.W. 4969 (U.S. June 28, 1985), dictates that the

> proper disposition of these claims was a dismissal for prematurity rather than abstention followed by dismissal on the merits for failure to "exhaust" state remedies...In the instant case, the State of Virginia has procedures for obtaining just compensation which the Plakas have failed to utilize. Va. Code § 8.01-187 (1950 amended) provides compensation for both takings and damage to property, and provides a statutory mechanism for enforcing inverse condemnation claims under the Virginia Constitution's just Compensation Clause.

803 F.2d 714, at 3 (4th Cir. 1986), unpublished opinion.

The Sixth Circuit Court of Appeals in *Eaton v. Charter Township of Emmett* held the following:

> Although appellants assert that this was a "physical" rather than "regulatory" taking, even if this is true, the distinction is of no consequence. As this court has noted, the distinction between physical and regulatory takings is "fuzzy at best."...assuming arguendo that Emmett's demolition of the buildings constituted a physical taking, appellants were still required to seek compensation, which they clearly have not done.

317 F. App'x 444, at 451 (6th Cir. 2008), unpublished opinion. The 6th Circuit Court of Appeals furthered opined in *Coles v. Granville* that:

> Over the last ten years Ohio courts, including the Ohio Supreme Court, have consistently recognized mandamus as the vehicle with which to contest an involuntary taking, no matter whether that taking is a regulatory or physical one, and no matter whether the public actor is a state or local entity. Because the Supreme Court's direction in *Williamson* requires us to assess the adequacy of state measures, these differences in the state of Ohio decisional law require this Court to reach a different conclusion today than that reached by the *Kruse* panel ten years ago...In the instant case there is no dispute that Plaintiffs have failed to request mandamus from the state. There case is therefore not yet ripe for review.

448 F.3d 853, at 865 (6th Cir. 2006).

The Eighth Circuit Court of Appeals in *Metzger v. Village of Cedar Creek, Nebraska* also dealt with a physical taking. In that case, the Appellant argued that the construction of an earthen levee alongside a creek caused substantial flooding and damage to her neighboring farm. *Metzger*, 370 F.3d 822, 823 (8th Cir. 2004).

> Metzger filed a lawsuit against Cedar Creek and Fuxa, alleging they conspired to take her property without just compensation in violation of (1) the Fifth and Fourteenth Amendments to the United States Constitution...The district court ruled Metzger's claims were not ripe under *Williamson*, and thus, the district court lacked subject matter jurisdiction over the claims, because Metzger failed to allege she had

> pursued and exhausted her administrative remedies for just compensation under state law...Having reviewed Metzger's complaint, we conclude the district court correctly determined *Williamson* controls and requires Metzger to obtain a final decision by the state administrative entity charged with implementing the applicable regulations, or by the appropriate state court action, before her claims are ripe for adjudication...Without Metzger pursuing one of these procedures, or some other appropriate state action, the district court could not determine whether Cedar Creek and Fuxa denied Metzger just compensation.

Id.

The Ninth Circuit Court of Appeals in *Sinaloa Lake Owners Association v. City of Simi Valley*, found the following:

> Defendants argue, and the district court held, that this claim is not ripe because plaintiffs have failed to exhaust their state remedies. Defendants rely on *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed2d 126 (1985)...A physical taking, such as the one at issue here, is by definition a final decision and thereby satisfies *Williamson County's* first exhaustion requirement. The second, and independent, hurdle established by *Williamson County* requires plaintiffs to "seek compensation through the procedures the State has provided for doing so" before turning to the federal courts...Plaintiffs, citing footnote 28 of *Hall*,

> contend that the second requirement of *Williamson County* is also inapplicable to physical invasion cases. That footnote however, only relieves plaintiffs of the obligation to exhaust administrative remedies in physical taking cases-it does not excuse them from seeking just compensation through state procedures. Even in physical taking cases, compensation must first be sought from the state if adequate procedures are available.

882 F.2d 1398, at 1402 (9th Cir. 1989). The district court's judgment that the taking claim was not ripe was affirmed. *Id.*, at 1411.

The Tenth Circuit Court of Appeals was confronted with a similar case to the one sub judice in *J.B. Ranch, Inc. v. Grand County*. In that case, Utah passed a statute requiring "all roads, including those not regularly maintained, which it deemed were established public thoroughfares" to be identified. *J.B. Ranch*, 958 F.2d 306, at 307 (8th Cir. 1992). In enacting the statute, the County declared roads inside of the J.B. Ranch, Inc.'s property to be public thoroughfares, and informed them via letter that "it could not lock the gates to the ranch." *Id.*

> The corporation seeks only declaratory relief in the form of a judgment quieting title to the roads. After reviewing the record and legal issues involved in this case, we hold that Plaintiff's claims are not ripe for review in this court...In *Williamson*, the Supreme Court noted that "a property owner has not suffered a violation of the Just Compensation Clause until the owner has unsuccessfully attempted to

> obtain just compensation through the procedure provided by the State for obtaining such compensation." 473 U.S. at 195.

Id, at 308. In summary, the 10th Circuit Court of Appeals stated that the "facts of this case fall squarely within Fifth Amendment analysis," and held that the Appellant's constitutional claims were not ripe. *Id.*, at 309.

As for the Federal Circuit, it does not appear that a case with the requisite facts have come before it to enable that Court to voice its opinion on the matter. The case Fletcher Fly has supplied, *Casitas Municipal Water District v. U.S.*, 556 F.3d 1329 (Fed. Cir. 2009), neither cites *Williamson County* nor discusses the ripeness issues at question here.

Similarly, this issue does not seem to have come before the D.C. Circuit either. The question presented before the D.C. Circuit Court of Appeals in *Building Owners & Managers Ass'n v. FCC* is whether a taking had occurred as a result of the adoption of the Telecommunications Acts of 1996: Restrictions on Over the Air Reception Devices (OTARD). 254 F.3d 89, at 100. "Accordingly, because petitioners' facial challenge fails to present an 'identifiable set of instances in which mere application of [the amended OTARD rule] will necessarily or even probably constitute a taking'...we apply *Chevron* deference to the Commission's interpretation..and we deny the petition." *Id.* The issue of ripeness is not discussed in the opinion, and *Williamson* County is cited only in the concurring opinion as support for the proposition that "claims against the Federal Government are

premature until the property owner has availed itself of the process provided in the Tucker Act." *Id.* at 101.

So, after reviewing law that is actually applicable to the case sub judice, one finds that the country is not so divided or split as the Appellant, Fletcher Fly, would lead the Court to believe. In fact, the Circuits are not split at all, as shown above, they actually agree. Before the federal court can obtain subject matter jurisdiction for a Fifth Amendment "physical taking" claim, the claimant must first exhaust their available state remedies to seek just compensation.

CONCLUSION

The cases cited above directly refute Fletcher Fly's contention that physical takings claims are not required to satisfy the *Williamson County* ripeness standard, and that there is a split among the circuits. Accordingly, the Petition for Writ of Certiorari should be denied.

RESPECTFULLY SUBMITTED, this the 14th day of December, 2010.

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